

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 10-053611

Employee: Steven Crossley

Employer: Southwestern Bell Telephone Co./A T & T Communications

Insurer: Self-Insured/Old Republic Insurance Company

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 30, 2013. The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued May 30, 2013, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 17th day of December 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee:	Steven Crossley	Injury No.: 10-053611
Dependents:	N/A	
Employer:	Southwestern Bell Telephone Co.	Before the Division of Workers' Compensation Of Missouri Jefferson City, Missouri
Additional Party	N/A	
Insurer:	Self C/o Sedgwick Claims Mgmt.	
Hearing Date:	February 26, 2013	Checked by: KOB

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: July 9, 2010
5. State location where accident occurred or occupational disease was contracted: Saint Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant slipped and fell, injuring his right knee.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Right knee
14. Nature and extent of any permanent disability: 35% PPD of the right knee
15. Compensation paid to-date for temporary disability: \$19,738.47
16. Value necessary medical aid paid to date by employer/insurer? \$18,340.97

- 17. Value necessary medical aid not furnished by employer/insurer? \$39,024.83
- 18. Employee's average weekly wages: \$970.92
- 19. Weekly compensation rate: \$647.26 /\$422.97
- 20. Method wages computation: By Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$39,024.83
14 6/7 weeks of temporary total disability:	\$ 9,616.40
56 weeks of permanent partial disability from Employer:	\$ 23,686.32

22. Second Injury Fund liability: N/A

TOTAL: \$ 72,327.55

23. Future requirements awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: John Winterscheidt

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Steven Crossley	Injury No.: 10-053611
Dependents:	N/A	
Employer:	Southwestern Bell Telephone Co.	Before the Division of Workers' Compensation Of Missouri Jefferson City, Missouri
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PRELIMINARIES

The matter of Steve Crossley ("Claimant") proceeded to final hearing on February 26, 2011. Attorney John Wintersheidt represented Claimant. Attorney Sarah Reichert represented Southwestern Bell Telephone Company aka AT&T Communications ("Employer"), and third-party administrator Sedgwick CMS.

The parties stipulated Claimant sustained an accidental injury to the right knee, arising out of and in the course of his employment on July 9, 2010. The St. Louis Division of Workers' Compensation is the proper venue, and notice, timeliness of the claim, and coverage of the Act were not at issue. The parties further stipulated at the relevant time, Claimant was an employee of Employer, who earned an average weekly wage of \$970.92, with corresponding rates of compensation of \$647.26 for temporary total disability ("TTD") benefits and \$422.97 for permanent partial disability ("PPD") benefits. Employer paid \$19,738.47 in TTD benefits from July 10, 2010 to January 25, 2011. Employer also paid medical benefits in the amount of \$18,340.97.

The issues for determination are: 1) Medical causation; 2) Employer's liability for past medical expenses of up to \$39,024.83; 3) Employer's liability for TTD benefits from April 1, 2011 to July 14, 2011, or \$9,616.40; and 4) Employer's liability for PPD benefits.

Claimant's exhibits A through L, and Employer's exhibits 1 through 3 were offered and admitted without objection.

The dispute in this case is whether Claimant's acknowledged work accident is the prevailing factor and medical cause for the second right knee surgery and associated benefits. Employer accepts responsibility for a once-operated knee, but disputes additional liability. Claimant asserts the work accident was the prevailing factor in both surgeries and resultant disability. The evidence compels an award in favor of Claimant.

FINDINGS OF FACT

Live Testimony and Medical Records

Claimant is a fifty-eight-year-old man who worked for Employer as a “prim tech” from 2008 to July 14, 2011. His job involved installing Employer’s “U-Verse” technology in residences and businesses, which required climbing utility poles and ladders, ascending and descending stairs, climbing into and crawling around attics and crawl spaces, frequent bending, stooping, and kneeling, and walking on uneven surfaces. Other than occasional pain and stiffness in his knees and wrists that he attributed to “getting older”, Claimant never had any problems with his right knee before July 9, 2010. Likewise, prior to July 9, 2010, Claimant never injured his right knee, received medical treatment or missed time from work due to his right knee.

On July 9, 2010, while performing an installation, Claimant had to pull coaxial cable through a wet, sloped, wooded area. While doing so, he slipped, twisted his right knee and fell to the ground landing on the knee. Claimant felt immediate pain in the knee.

Employer directed Claimant to Concentra Medical Center that day for treatment. Concentra records reflect a history of Claimant’s accident as well as a history of swelling in the right knee off and on for the last six months. Claimant explained that he told the Concentra medical personnel about the aches and pains he had experienced in both of his knees and wrists before the accident, but did not recall telling them that his right knee had previously swelled.

Concentra medical personnel diagnosed Claimant with a right knee strain, provided him with an ACE bandage, referred him to physical therapy, and instructed him to ice and exercise the knee. Work restrictions of no squatting, kneeling or ladder climbing were imposed. Employer did not have work available within those restrictions. The July 16, 2010 record of Employee’s follow-up visit states, “[a]ccording to the history provided by the patient and the physical exam it is my professional opinion that work was the prevailing factor in the patient’s injury.”

Physical therapy did not help Claimant’s condition. An MRI revealed signal changes in the medical meniscus suggesting the possibility of a radial tear. Concentra personnel diagnosed a meniscal tear, referred Claimant to an orthopedic surgeon, and imposed work restrictions of no climbing and sitting 50% of the time. Employer could not accommodate those restrictions.

On August 12, 2010, orthopedic surgeon Dr. Christopher Kostman, evaluated Claimant, recorded a history of Claimant’s July 9, 2010 accident, and diagnosed a right knee injury with probable medial meniscal tear. Dr. Kostman injected Claimant’s knee and recommended surgery. Employer could not accommodate the continued work restrictions.

After obtaining cardiac clearance¹, on December 10, 2010, Dr. Kostman¹ performed an arthroscopic partial medial meniscectomy and chondroplasty of the patellofemoral joint.

¹ Claimant has a history of cardiac issues, including heart attacks in 1995 and 2000. He obtained clearance from his cardiologists by undergoing testing at Belleville Memorial Hospital in the Fall of 2010, prior to his first surgery. He incurred medical expenses of \$9,666.98. Clearance from his cardiologist was a prerequisite for surgery.

Following surgery, Dr. Kostman excused Claimant from work, referred him for additional physical therapy, and on December 22, 2010, released him to return to work with restrictions of 50% deskwork, no lifting, pushing or pulling greater than 35 pounds and no ladder climbing. Employer could not accommodate those restrictions.

The January 24, 2011 functional capacity evaluation (“FCE”) revealed an overall good effort and determined that Claimant could return to work in the medium work level, but that he did not meet the essential job demands required by his position with Employer. On January 25, 2011, Dr. Kostman released Claimant to return to work without restrictions and declared Claimant to be at maximum medical improvement (“MMI”). Although Dr. Kostman’s report indicated full range of motion, almost no swelling and tenderness to palpation, Claimant testified that as of that date, he still experienced knee pain, swelling, occasional popping, and a feeling that his knee would give out while ascending and descending stairs.

Claimant returned to work for Employer with an assigned a helper, and testified that he was able to do his job with difficulty. He purchased an over-the-counter knee brace, but still had significant difficulty performing his job duties of pole and ladder climbing. Sometime in March 2011, Claimant’s right knee gave out when he stepped out of his truck. He grabbed a handle on the truck to keep from falling. He testified that the incident did not change the symptoms he felt when he last saw Dr. Kostman.

Employer denied Claimant’s request² to return to Dr. Kostman, so Claimant sought medical treatment with his family physician, Dr. Kelly Wood, on April 1, 2011. Dr. Wood recorded symptoms of post-operative pain, buckling, popping, grinding and swelling. She noted Claimant has difficulty performing his job duties, especially climbing poles. Dr. Wood diagnosed post surgery right knee pain, ordered X-rays, prescribed medication, and referred Claimant for another FCE. Dr. Wood also placed work restrictions of no kneeling or climbing, which Employer could not accommodate.

The April 14, 2011 FCE revealed near full levels of physical effort on Claimant’s behalf as well as full reliability of Claimant’s reports of pain and disability. The FCE determined that Claimant is not capable of performing his job duties as a “communications technician”, but was able to work at the “light-medium” level.

At Dr. Wood’s referral, orthopedic surgeon Dr. Forbes McMullin saw Claimant on April 5, 2011. Dr. McMullin recorded a history of the July 9, 2010 accident and resulting medical treatment, and diagnosed Claimant with right knee pain consistent with chondromalacia of the patella and a recurrent meniscal tear. Dr. McMullin excused Claimant from work. The April 7, 2011 MRI revealed chronic degradation of the medial and lateral menisci with superimposed post-operative changes to the medial meniscus and a recurrent tear involving the undersurface of the posterior horn of the medial meniscus remnant. Dr. McMullin recommended surgery.

Following cardiac clearance, Dr. McMullin performed surgery on May 9, 2011 consisting of an arthroscopic partial medial meniscectomy with recontour of the remnant with radio frequency probe and a chondroplasty of the medial compartment of the knee and patella.

² Claimant’s counsel documented the request and refusal in an April 4, 2011 letter (Exhibit D).

Dr. McMullin allowed Claimant to return to work with restrictions on June 22, 2011, but Employer could not accommodate Claimant. Dr. McMullin advised Claimant to find alternative work, so Claimant resigned his employment with Employer on July 14, 2011. On July 20, 2011, Dr. McMullin last saw Claimant. He felt the second surgery was related to the initial accident. He assigned permanent restrictions of no squatting, kneeling or climbing. Claimant testified that the second surgery improved his knee condition, but it is not what it was before his July 9, 2010 accident.

Claimant found part-time work within his restrictions at Glotel as a driver earning \$13.00 an hour. He has since found full-time employment within his restrictions with World Wide Technology where he works as an assistant supervisor overseeing the assembly of computer racks and earns less money than he did when he worked for Employer.

As a result of the medical treatment for his right knee following January 25, 2011, the end of authorized treatment, Claimant has incurred medical bills in the amount of \$39,024.83. During the 14 6/7 weeks Claimant was unable to work between April 1, 2011 and July 14, 2011, he received no TTD.

At trial, Claimant testified that his knee swells and that he experiences occasional pain. He is still "hesitant" ascending and descending stairs because periodically his knee feels like it could give out. He is unable to kneel, and can squat only with significant pain. Claimant cannot ride his bicycle or Jet Ski as he did prior to his accident, and his knee aches if he is on his feet for extended periods of time. He has gained about 30 pounds since his accident due to his inactivity. Claimant continues to ride his motorcycle recreationally, but if he remains seated for too long, his knee becomes stiff.

Expert Opinions

Dr. McMullin, a board-certified orthopedic surgeon, testified by deposition on behalf of Claimant. Dr. McMullin opined that Claimant's July 9, 2010 accident was the primary or prevailing factor in causing the right knee condition he treated. He explained that Claimant either had a recurrent tear of the medical meniscus, or the tear was not completely treated. Following his treatment, Dr. McMullin imposed permanent work restrictions of no squatting, kneeling or climbing. He further testified that all the medical treatment Claimant received was reasonable and necessary to cure and relieve the effects of Claimant's work injury. Finally, Dr. McMullin testified that his bills, as well as the bills of the other medical providers at issue, are usual and customary for similar services in this geographic area.

Dr. Kostman, a board-certified orthopedic surgeon, testified by deposition on behalf of Employer. Dr. Kostman testified that Claimant's meniscal tear he treated in the first surgery was causally related to Claimant's July 9, 2010 accident, and following his December 10, 2010 surgery; Claimant reached MMI and was able to return to work without restrictions on January 25, 2011. Dr. Kostman finds no connection between the work injury and the treatment Claimant obtained after the January 2011 release. After reviewing the April 7, 2011 MRI and Dr. McMullin's May 9, 2011 operative note, Dr. Kostman testified that the MRI did not reveal evidence of a new tear in Claimant's medical meniscus, Dr. McMullin's surgery was unrelated to Claimant's work accident, and surgery was necessitated by advanced arthritis. Dr. Kostman

opined that Claimant has 1% permanent partial disability referable to his right knee and the first surgery, but did not consider the effects of the second surgery on permanent disability.

Dr. Shaun Berkin, a board-certified family medicine practitioner, evaluated Claimant on September 10, 2012, issued a report, and testified on his behalf. Dr. Berkin found Claimant to have pain and tenderness, a limited range of motion with an inability to kneel, and pain with sitting prolonged periods of time and stair climbing. Dr. Berkin opined that Claimant's July 9, 2010 work accident was the prevailing factor in causing Claimant's right knee condition, and that the treatment Claimant received after the end of authorized treatment was reasonable and necessary to cure and relieve the effects of Claimant's work accident. Dr. Berkin recommended permanent work restrictions of no squatting, kneeling, stooping, turning, twisting, lifting or climbing. He further advised Claimant to be cautious when climbing ladders or stairs, working at heights, and walking on uneven surfaces. Dr. Berkin testified that the medical bills related to the post-MMI medical treatment are reasonable and fair. Finally, Dr. Berkin testified that Claimant has 42 ½% permanent partial disability to his right knee as a result of his July 9, 2010 work accident.

RULINGS OF LAW

1. Causation

The dispute in this case is whether work is the prevailing factor or cause of the need for the second surgery. Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo.App. W.D.2002)³; *see also Davies v. Carter Carburetor*, 429 S.W.2d 738, 749 (Mo.1968); *McCoy v. Simpson*, 346 Mo. 72, 139 S.W.2d 950, 952 (1940). While the claimant is not required to prove the elements of his claim on the basis of "absolute certainty," he must at least establish the existence of those elements by "reasonable probability." *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App. E.D.1999) (citing *Cook v. Sunnen Prods. Corp.*, 937 S.W.2d 221, 223 (Mo.App. E.D.1996)). Furthermore, the element of causation must be proven by medical testimony, "without which a finding *for claimant* would be based on mere conjecture and speculation and not on substantial evidence." *Grime*, 83 S.W.3d at 583 (citing *Jacobs v. City of Jefferson*, 991 S.W.2d 693, 696 (Mo.App. W.D.1999)) (emphasis added); *see also Shelton v. City of Springfield*, 130 S.W.3d 30, 38 (Mo.App. S.D. 2004).

I find Claimant has met his burden of proving the requisite causal connection between the work accident and the treatment he sought on his own on and after April 1, 2011. First, Claimant's testimony supports the finding he was not at MMI when Dr. Kostman so indicated. Claimant testified credibly that he remained symptomatic in January 2011. He also had significant problems when he returned to work. The problems were consistent from before his MMI release to the time of the second surgery, and include pain, popping, swelling and a feeling of instability.

³ This is one of several cases cited herein that were among those overruled, on an unrelated issue, by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224-32. Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus I will not further note *Hampton's* effect thereon.

The credible medical testimony of Drs. McMullin and Berkin leads to the conclusion that Claimant had not reached maximum medical improvement when he was released by Dr. Kostman and that the medical treatment he received after April 1, 2011 was reasonable and necessary to cure and relieve the effects of his July 9, 2010 injury. Dr. McMullin, being the operating surgeon for the second surgery, was in a unique position to testify as to the condition of Claimant's knee, the first-hand findings he made, and the conclusion he reached based on what he actually saw. He credibly explained how the tear he repaired was at the same location of the first repair, how the initial tear degraded the quality of the meniscus, and how the condition he observed firsthand is "all related to the initial injury." He found the connection back regardless of whether the tear he repaired was a recurrence of the first tear, or an untreated tear. To be clear, I read Dr. McMullin's testimony to stand for the proposition that even if Dr. Kostman repaired the tear, the second tear is still causally connected to the work accident because the accident so degraded the meniscus that it was bound to tear again. Contrary to Employer's post-trial brief, Dr. McMullin does support causation. Dr. Berkin supports Dr. McMullin's conclusions.

While Dr. Kostman is equally as qualified by experience as Dr. McMullin, he did not observe the condition of the knee at the second surgery. Furthermore, he underplayed the significance of Claimant's continued symptoms by prematurely placing him at MMI. Finally, to the extent the tear repaired by Dr. McMullin could be considered a failure of Dr. Kostman's work, it is understandable why Dr. Kostman's opinion might not be completely objective.

For these reasons, I find the credible evidence supports a finding of causation. The treatment Claimant received on and after April 1, 2011, was necessary to cure and relieve the effects of a condition caused the July 9, 2010 work accident.

2. Medical Expenses.

Claimant seeks to recover medical expenses incurred after he was released from authorized treatment. Section 287.140.1 provides in pertinent part:

In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury....

The employer shall have the right to select the health care provider. § 287.140.1. It is only when the employer fails to do so that the employee is free to pick his own provider and assess those costs against his employer. *Poole v. City of St. Louis*, 328 S.W.3d 277, 291 (Mo.App. E.D.,2010). A sufficient factual basis to award past medical expenses exists when employee identifies all of the medical bills as being related to and the product of his work related injury and the medical bills are shown to relate to the professional services rendered by medical records in evidence. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo. Banc 1989).

The disputed medical bills were for treatment that was required after the injury or disability, to cure and relieve from the effects of the injury. As Employer failed to provide the required treatment upon demand, Claimant was free to pick his own provider and assess the costs against Employer. There is a sufficient factual basis to award past medical expenses of \$39,024.83.

3. Temporary Total Disability.

Claimant seeks to recover TTD benefits for the missed time due to doctor's restrictions. The purpose of a temporary, total disability award is to cover the employee's healing period. *Birdsong v. Waste Management*, 147 S.W.3d 132, 140 (Mo.App. S.D.2004). Temporary total disability awards should cover the period of time from the accident until the employee can either find employment or has reached maximum medical recovery. *Id.* "When further medical progress is not expected, a temporary award is not warranted." *Boyles v. USA Rebar Placement, Inc.*, 26 S.W.3d 418, 424 (Mo.App. W.D.2000) (overruled on other grounds). "A claimant is capable of forming an opinion as to whether she is able to work, and her testimony alone is sufficient evidence on which to base an award of temporary total disability." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 249 (Mo. Banc 2003) (overruled on other grounds).

The period of time for which Claimant was medically unable to work covers a period of time from April 1, 2011 to July 14, 2011. Claimant is entitled to TTD benefits totaling \$9,616.40.

4. Permanent Partial Disability.

To satisfy his evidentiary burden, an employee must prove the duration and extent of his disability. *Davis v. Brezner*, 380 S.W.2d 523,528 (Mo.App.S.D.1964). Proof of permanent partial disability requires "reasonable medical certainty". *Griggs v. A.B. Chance*, 503 S.W. 2d 679, 703 (Mo. App. 1973). Therefore, the employee must produce evidence from which it may be reasonably inferred that he (1) sustained a work related injury and it (2) resulted in some permanent disability.

An award of permanent partial disability is intended to include the employee's permanent limitations resulting from a work injury and any restrictions that his limitations may impose on employment opportunities. *Phelps v. Jeff Work Construction Co.*, 803 S.W. 2d 641 (Mo. App. 1991). The administrative law judge has discretion as to the amount of permanent partial disability awarded and how it is calculated. *Rana v. Land Star, TLC*, 46 S.W.3d 614,626 (Mo.App.W.D.2001).

Based on the substantial and competent evidence of record, including the Claimant's credible testimony, the medical records, and the expert opinions, I find Claimant sustained PPD equivalent to 35% of the right knee. Employer shall provide Claimant with compensation of \$ 23,686.32.

CONCLUSION

The July 9, 2001 accidental injury is the prevailing factor in Claimant's current condition and disability, including the condition necessitating medical treatment after April 1, 2011. Employer shall compensate Claimant as provided herein

Date: _____

Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation